

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3
4)
5 GILBERTO PEREIRA BRITO,)
6 FLORENTIN AVILA LUCAS, and)
7 JACKY CELICOURT, individually)
8 and on behalf of all those)
9 similarly situated,)
10 Plaintiff-Petitioners,) Civil Action
11) No. 1:19-cv-11314-PBS
12)
13 v.)
14)
15 WILLIAM BARR, et al.,)
16)
17 Defendant-Respondents.)
18)

19 BEFORE THE HONORABLE PATTI B. SARIS
20 UNITED STATES DISTRICT JUDGE

21 MOTION HEARING

22 August 5, 2019
23 9:32 a.m.

24 John J. Moakley United States Courthouse
25 Courtroom No. 19
One Courthouse Way
Boston, Massachusetts 02210

Linda Walsh, RPR, CRR
Official Court Reporter
John J. Moakley United States Courthouse
One Courthouse Way, Room 5205
Boston, Massachusetts 02210
lwalshsteno@gmail.com

1 APPEARANCES:

2 On Behalf of the Petitioners:

3 MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, PC
4 By: Andrew Nathanson, Esq.
5 Susan M. Finegan, Esq.
6 One Financial Center
7 Boston, Massachusetts 02111
8 617-542-6000
9 anathanson@mintz.com
10 sfinegan@mintz.com

11 AMERICAN CIVIL LIBERTIES UNION
12 By: Daniel L. McFadden, Esq.
13 Mathew Segal, Esq.
14 Adriana Lafaille, Esq.
15 211 Congress Street
16 Boston, Massachusetts 02110
17 617-482-3170
18 dmcfadden@aclum.org
19 msegal@aclum.org
20 alafaille@aclum.org

21 AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
22 By: Gilles R. Bissonnette, Esq.
23 SangYeob Kim, Esq.
24 18 Low Avenue
25 Concord, New Hampshire 03301
603-224-5591
gilles@aclu-nh.org
SangYeob@aclu-nh.org

18 On Behalf of the Respondents:

19 UNITED STATES DEPARTMENT OF JUSTICE
20 By: Huy Le, Esq.
21 P.O. Box 868, Ben Franklin Station
22 Washington, DC 20044
23 202-353-4028
24 Huy.M.Le2@usdoj.gov

25 Proceedings reported and produced
by computer-aided stenography

P R O C E E D I N G S

THE CLERK: Court calls Civil Action 19-11314, *Brito, et al. versus Barr, et al.*

Would counsel please identify themselves.

MR. McFADDEN: Good morning, Your Honor. Dan McFadden on behalf of the Petitioners.

MR. NATHANSON: Andrew Nathanson for the Petitioners.

MR. SEGAL: Good morning, Your Honor. Matthew Segal for the Petitioners.

MS. FINEGAN: Good morning. Sue Finegan for the Petitioners.

MS. LAFAILLE: Adriana Lafaille for the Petitioners.

MR. BISSONNETTE: Gilles Bissonnette with the Petitioners, Your Honor.

MR. KIM: Sany Yeob Kim for the Petitioners, Your Honor.

MR. LE: Good morning, Your Honor. Huy Le for the Government, Respondents.

THE COURT: By yourself?

MR. LE: Yes, ma'am.

THE COURT: All right. You may be seated. Thank you. And good morning to everyone.

So we'll start with the issue of what's on the table for this morning. Obviously there's a motion for class certification, which has been fully briefed, and I will

1 consider this morning, but there's also a second motion for
2 judgment which we're going to have to discuss as well.

3 Effectively, I think, I have till 11:30 for you. So,
4 you know, we can start delving into the issues. Thank you. Go
5 ahead.

6 Who's arguing the motion for class cert?

7 MR. NATHANSON: Me, Your Honor.

8 THE COURT: Have you given the court reporter all your
9 names since it was going pretty quickly?

10 MR. NATHANSON: I think so. Did you get it?

11 THE COURT: All right.

12 MR. NATHANSON: With respect to the motion for --

13 THE COURT: Why don't you introduce yourself again for
14 the record.

15 MR. NATHANSON: I'm sorry. I'm Andrew Nathanson from
16 Mintz Levin, Your Honor.

17 THE COURT: Thank you.

18 MR. NATHANSON: With respect to the motion for class
19 certification, I think the appropriate place to start is to
20 talk about what we don't dispute. Most of the 23(a)
21 requirements are not disputed here, numerosity. With respect
22 to commonality, there's no dispute that there is a common issue
23 that encompasses everybody in the class, and with respect to
24 typicality, there's no dispute that that common issue is shared
25 by the named Petitioners as well as every class member.

1 And with respect to adequacy, there seems to be no
2 dispute both that the named Petitioners do not have any kind of
3 a conflict that would prevent them from adequately representing
4 all of the class members, and no dispute that class counsel is
5 capable of representing everybody, everybody's interests
6 competently and in align with each other.

7 So what we seem to be talking about here are two
8 issues. One is that the Government says that -- that adequacy
9 is defeated because the named Petitioners, the three named
10 Petitioners have now been released voluntarily by the
11 Government. And as far as that goes, I mean, I'm prepared to
12 stand on what we said in the briefs. The fact of the matter is
13 that that's not an impediment -- resolution of the named
14 Petitioners' claims is not necessarily an impediment to their
15 continuing to adequately represent the class, and the
16 Government hasn't suggested that anything would prevent them
17 from doing so.

18 THE COURT: But they're still in the country?

19 MR. NATHANSON: They're still in the country, yes,
20 they are, and they are still involved in the case. We're still
21 in contact with them. They're still capable and willing of
22 serving as class representatives. And as we pointed out in the
23 brief, they have a live and ongoing interest in the resolution
24 of this because they've been released at the Government's
25 discretion. They're subject to rearrest, and they could be

1 subjected to the unconstitutional procedures that they were
2 subjected to the first time around as well. So they are still
3 members of the class, and so I don't think there's any question
4 about their adequacy.

5 The last issue is this issue of prejudice, that there
6 is some sort of individual issues that prevent you from finding
7 commonality, typicality or compliance with Rule 23(b)(2). And
8 I think the way to sum all of that up is that in each case it's
9 the tail wagging the dog. The overarching issue here is both
10 common and typical and relates to a practice that the
11 Government has -- or actions that the Government has undertaken
12 with respect to the entire class, which is whether they have
13 given them due process in their bond hearings.

14 The question of prejudice, I think it may be helpful
15 to put it in context, what "prejudice" means here. In our
16 reply brief, we happen to cite yet another decision in *Reid*
17 *versus Donelan*, an early one from Judge Ponsor back in 2014,
18 where he talked about the prejudice requirement and he
19 characterized it this way: He said it's analogous to harmless
20 error in appellate proceedings in that its purpose is to weed
21 out situations in which error may have occurred, but it would
22 be needless to remand because the outcome wouldn't change. And
23 that's exactly what the purpose that the prejudice requirement
24 serves here as well.

25 This isn't a situation as in, for example, *Reid versus*

1 *Donelan* or *Wal-Mart versus Dukes* where you need individualized
2 adjudications in order to determine who the members of the
3 class are --

4 THE COURT: You know, I addressed this once. I have
5 so many of these opinions. But I did address the prejudice
6 prong once, and I said that it was a standard of a could have
7 made a difference. Are you urging me to relive that or revisit
8 that?

9 MR. NATHANSON: No, not at all.

10 THE COURT: It's not an onerous burden, but it does
11 require some individual attention. I'm not saying any of the
12 named Plaintiffs are this, but somebody with a very serious
13 criminal issue, for example, under the C category, you know,
14 you might say, well, it wouldn't have made any difference who
15 bore the burden of proof. This person wasn't going to get out.

16 MR. NATHANSON: No, I'm not suggesting to you that you
17 can make a blanket ruling of prejudice for all of the subset of
18 detainees for whom prejudice is an issue. That's something
19 else I can address, if you'd like, that you're going --

20 THE COURT: So should I have possibly two classes or
21 subclasses, one dealing with people who have not yet had bond
22 hearings under 1223(a) category, and those who have already had
23 the bond hearings?

24 MR. NATHANSON: I don't think you need to do that. I
25 think it's a question of labels, but practically I think you

1 are going to end up doing the same thing no matter what. The
2 way I would envision it is that you would issue an injunction
3 that says every 1226 detainee who is in the class --

4 THE COURT: 1226(a).

5 MR. NATHANSON: -- 1226(a) is entitled to a bond
6 hearing. Unless they've already had a bond hearing, the
7 Government contests the prejudicial nature of that bond hearing
8 and the detainee fails to satisfy the Court with the could have
9 affected -- under the could-have-affected standard.

10 THE COURT: That would mean that the person would have
11 to come back through a habe here.

12 MR. NATHANSON: They'd have to come back to some sort
13 of a proceeding. Again, it's a matter of labels. Where if you
14 want to call it a habe proceeding, then, yeah, that's what they
15 would do.

16 THE COURT: Any requested relief would be very
17 straightforward to anyone who hasn't had a bond hearing yet.
18 It's more complicated for people who failed. I would say that
19 I've had several cases. I don't remember how many at this
20 point. The majority have been released on bail but some have
21 not, and so it's a decision for the immigration judge
22 ultimately under the correct standard.

23 MR. NATHANSON: Yes, whether they're released or not
24 would be the decision for the immigration judge ultimately
25 under the correct standard. Whether they're entitled --

1 whether people in that subset are entitled to a second hearing
2 would be a decision for the Court under that could-have-
3 affected standard.

4 THE COURT: So you would essentially just be -- not
5 enjoining, not telling the kind of relief you would seek, not
6 telling the immigration judge to redo it is basically -- the
7 person would have to come back here, demonstrate prejudice, and
8 then whoever the judge is with an order, if there was
9 prejudice, the immigration court to redo it.

10 MR. NATHANSON: Not unlike what you did recently in
11 *Reid versus Donelan* where you said -- except that in *Reid*
12 *versus Donelan*, the individualized adjudication was an
13 adjudication of whether a constitutional violation had occurred
14 in the first place. Here what you'd be doing is determining
15 whether a remedy would be prudentially worth doing.

16 THE COURT: It would be a decision of a habeas judge.

17 MR. NATHANSON: Yes.

18 THE COURT: In this court.

19 MR. NATHANSON: But for purposes of class
20 certification, my point is that that add-on doesn't destroy the
21 commonality or typicality.

22 THE COURT: Right, but it may make it worthwhile to
23 have two classes or a subclass. What are you thinking on that?
24 I mean, they seem to have different interests.

25 MR. NATHANSON: I think -- conceptually it's hard for

1 me -- you can look at it both ways. From my perspective,
2 conceptually they all have the same interest. Everybody has an
3 interest in getting a constitutionally proper bond hearing.
4 The prejudice inquiry is simply a way for you to determine on
5 the basis of the prudential concerns that animate the prejudice
6 requirement whether it's actually worth it in an individual
7 case to send it back to the immigration court for a second bond
8 hearing or not.

9 THE COURT: This is a question of relief rather than a
10 question of how you certify the class.

11 MR. NATHANSON: Exactly, exactly. And I think you can
12 do that with one class and one injunction and simply say, as I
13 suggested, everybody is entitled to a bond hearing unless they
14 are identified as one of these people in that subset. The
15 Government can test prejudice, but they very well may not be
16 given the low bar, and then, of course, the burden would still
17 be on the detainee to demonstrate prejudice.

18 THE COURT: Now, let me ask you this: I've ruled on
19 the Due Process Clause already, but I have not ruled on the
20 Administrative Procedure Act. Are you requesting me to certify
21 a class under the APA? Administrative Procedure Act for those
22 who are just following it from the audience.

23 MR. NATHANSON: I don't think it's necessary here.

24 THE COURT: It's a new argument, one I haven't thought
25 about. Whether it even applies to BIA decisions, it would take

1 some time. It's a common issue. I suppose that would be true,
2 but it would slow me down a bit.

3 MR. NATHANSON: I don't think you need to do it at
4 this time because you can give the relief under the
5 Constitution, under the Due Process Clause, and so I don't
6 think it's necessary for you to reach something that you don't
7 have to reach.

8 THE COURT: All right. And one question I was -- this
9 is just a purely technical statutory issue, so somebody who
10 knows this -- and I'm going to ask the Government this, too --
11 under 1226(a), are you entitled to a bond hearing if you have a
12 final order of removal?

13 MR. NATHANSON: You're asking the wrong person. I'll
14 defer to Mr. McFadden to that. He's much better versed in the
15 technicalities than I am.

16 THE COURT: Or does that go into another statute?
17 Most of the people I've had in front of me have had final
18 orders of removal but nonetheless have litigated under 1226(a).

19 MR. McFADDEN: Your Honor, 1226(a) applies to a person
20 who is in proceedings before the immigration judge or the BIA
21 or in some cases the Circuit Court of Appeal, if the Court of
22 Appeal has granted a stay to hear the case. At the end of that
23 time period, when those three things have been exhausted, they
24 move into a mandatory detention period called the removal
25 period under a different statute.

1 THE COURT: That's 1231 or something like that?

2 MR. McFADDEN: I don't have it in front of me, Your
3 Honor, but I believe that's correct.

4 THE COURT: So let's assume for a minute someone has a
5 final order of removal because he didn't show up at a hearing.
6 Let's say he didn't get notice -- we see that happen a lot,
7 right? -- but there is a final order of removal, and he's
8 picked up on that.

9 MR. McFADDEN: Yes, Your Honor, if a person has an
10 order that is administratively final and final before the Court
11 of Appeals and that their time period to contest it, for
12 example, has lapsed, at that time they would not be under the
13 1226 framework. They would be into the removal period or
14 beyond removal period time period where their detention is
15 governed by a different statutory framework.

16 1226(a) and (c) apply to people who have been accused
17 of being noncitizens who are subject to deportation, and that
18 process is playing out. Some of them will end up being
19 citizens, many of them will not be subject to deportation
20 because they will be eligible for some type of relief.

21 THE COURT: So the correct way to define the class are
22 persons subject to 1226(a), and the matter -- in other words,
23 even one of the named Plaintiffs, for example, if I remember
24 correctly, there was a final order of deportation, but it turns
25 out he hadn't received a notice. So I wasn't sure whether he

1 would qualify until that was canceled.

2 MR. McFADDEN: So that was Mr. Pereira Brito, Your
3 Honor.

4 THE COURT: Yes.

5 MR. McFADDEN: He did have an absentia order of
6 removal that had entered in 2005. After he was arrested, that
7 order was vacated by the immigration judge.

8 THE COURT: So then he moves into the 1226(a)
9 category.

10 MR. McFADDEN: Correct, at that point he's in 1226(a).
11 So, yes, I think that we had asked for a class that would be
12 people who are now or will be detained pursuant to 1226(a).

13 THE COURT: Under that statute. So it could
14 be -- somebody would be originally not entitled to it but then
15 move into that status depending on what happened in the
16 immigration court.

17 MR. McFADDEN: That is correct, Your Honor.
18 Immigration detention is sometimes a bit of a moving target
19 because people do move through different statutory frameworks
20 over time.

21 THE COURT: All right. Thank you very much.

22 So you flew up from Washington?

23 MR. LE: Yes, ma'am.

24 THE COURT: For the world's most perfect weather up
25 here. All right. Go ahead.

1 MR. LE: Yes, Your Honor.

2 THE COURT: It's the one thing I'm sure we'll agree
3 on.

4 MR. LE: Yes, Your Honor. I'm originally from Boston
5 so it's good to be back regardless.

6 THE COURT: It's good to have you. All right. Go
7 ahead.

8 MR. LE: Thank you, Your Honor.

9 Well, before we even get to the commonality question,
10 the Government maintains that this -- the relief that the
11 petitioners request should be barred under 12 -- 8 U.S.C.
12 1252(f)(1). This, as Your Honor knows, no Court has the
13 jurisdiction to enjoin or restrain the operation of a
14 class-wide basis of certain provisions including the detention
15 provision at hand today, which is 8 U.S.C. 1226(a).

16 And the Government would like to point Your Honor to
17 the *Hamama* decision out in the Sixth Circuit. They -- the
18 Sixth Circuit had held that under similar situations as the one
19 presently, that 1252(f)(1) does indeed apply to the detention
20 statutes; and therefore, the court would be barred from
21 providing any class-wide injunction relief.

22 THE COURT: Did it deal with the issue of declaratory
23 relief?

24 MR. LE: I don't recall if they have -- actually, yes,
25 they did, Your Honor. If I recall --

1 THE COURT: I can look as well but --

2 MR. LE: Yes, Your Honor. I think that they had
3 addressed it as the functional equivalent to injunctive
4 relief -- no. They were skeptical that it would prevail on
5 declaratory relief alone on remand, Your Honor, under
6 1252(f)(1).

7 THE COURT: But they didn't definitively rule on that?

8 MR. LE: They did not definitively rule, Your Honor.

9 THE COURT: It seems as if the majority of the Supreme
10 Court would allow declaratory to go forward at the least.

11 MR. LE: Your Honor, if it were to go forward on
12 declaratory alone, solely on those basis, perhaps that would
13 be -- that would be valid. However, that's not really the
14 relief that's being sought here because the functionality of
15 the request that petitioners are requesting really -- what
16 we're looking at is indeed injunctive relief.

17 THE COURT: I don't think *Hamama* dealt with bail, did
18 it? I remember that case because I originally saw that coming
19 through the system. The issue is that the statute doesn't
20 provide for burdens of proof or standards of proof, so how
21 would I be enjoining the operation of the statute?

22 MR. LE: Well, Your Honor, to answer that question, to
23 contextualize it at least, the Government would point Your
24 Honor to *Nken v. Holder*, 556 U.S. 418, 2009.

25 THE COURT: 556 U.S.

1 MR. LE: 556 U.S. 418, 2009. The specific cite would
2 be Page 428 that the Government will allude to.

3 THE COURT: Which says?

4 MR. LE: The Supreme Court essentially in
5 contextualizing what injunctive relief is or how it applies in
6 immigration context, citing the Black's Law Dictionary as an
7 injunction as a court prohibiting someone from doing some
8 specified act or commanding someone to undo some sort of wrong.
9 And in that case, the Supreme Court further distinguished
10 between a stay versus an injunction. The Supreme Court
11 categorized a stay as suspending some sort of action, whereas
12 the -- whereas an injunction would be, quote-unquote, directing
13 an actor's conduct. Here that's essentially what the
14 petitioner's request for relief is, to direct the executive
15 branch to conduct their practice and operation of holding
16 immigration bond determination hearings in a certain way. One,
17 that would be shifting the burden to the Government; and two,
18 that they would be entitled to release within a reasonable time
19 if not.

20 So in that case, Your Honor, the relief that they
21 request certainly does fall under how the Supreme Court has
22 contextualized what injunctive relief is within the immigration
23 context. Yes, so, therefore, the Government still maintains
24 that the petitioners are barred from seeking this relief, and
25 even notably is that the statute under 1252(f)(1) provides a

1 separate basis, and what the Government submits is the proper
2 channel for these types of challenges, challenging the
3 constitutionality of the specific detainee's bond -- detention,
4 rather, and that's under the specific carve-out of an
5 individual habeas petition in front of the District Court.

6 THE COURT: So your view is the only court that can
7 issue injunctive relief is the Supreme Court?

8 MR. LE: When we're enjoining the operation of
9 immigration detention, yes, Your Honor.

10 THE COURT: The actual language of that says enjoining
11 a statute. It doesn't --

12 MR. LE: Yes, Your Honor, under the statute, the
13 operation of that statute, and it contains various provisions,
14 including the one that includes the statute at hand, which is
15 1226(a), Your Honor.

16 THE COURT: The thing I keep falling back on -- I
17 think about that -- but the statute doesn't prescribe any
18 burdens or standards, so I'm not sure it even applies here.

19 MR. LE: That's correct, Your Honor. But if we were
20 to look at Congressional intent and the agency's own
21 interpretation, the statute -- the statute does provide for the
22 burden being on the detainee, although not explicitly. But if
23 we look at the HR report on the statute, it certainly provides
24 context, and then the subsequent regulations that were
25 promulgated in the '90s in response to the enactment of 1226(a)

1 shows -- it certainly shows that it would be consistent with
2 Congressional intent to put the burden on the detainee. And in
3 that case, Your Honor, it would then certainly fall under
4 enjoining the operation of --

5 THE COURT: Do you know whether or not the
6 BIA -- basically BIA changed decades of experience by flipping
7 the burden in -- in other words, in the 1990s, they just
8 changed the burden that had been in existence based on a -- was
9 it a transitional rule that applied only to immigration
10 officers, right?

11 MR. LE: Immigration officers as in -- as interpreted
12 as the immigration authorities, Your Honor?

13 THE COURT: Yes, the officers who arrest. So --

14 MR. LE: Well, Your Honor, it's not -- if we were to
15 address the APA issue, that's separate, but to answer Your
16 Honor's question, they -- the BIA changed it and cited why that
17 they had changed it, and that's because the regulations that
18 are promulgated after the enactment of this -- of 1226(a) shows
19 that, one, the burden should be on the detainee, because, one,
20 that the presumption of eligibility of release --

21 THE COURT: I guess what I'm asking is does the
22 Administrative Procedure Act apply to the Board of Immigration
23 Appeals?

24 MR. LE: Yes, Your Honor.

25 THE COURT: There are cases that the APA applies to

1 the BIA?

2 MR. LE: Well, that -- it's an administrative court,
3 Your Honor, so the proper channel would be to -- if we were
4 addressing BIA decisions, would be through, I suppose -- it
5 would be a circuit court decision -- petition, rather.

6 THE COURT: You're representing the institution. So
7 in your view, if the BIA makes a mistake, in other words, they
8 basically, without notice or comment, they changed the
9 practice, so would that be subject to the Administrative
10 Procedure Act? Do they have to give notice in common
11 opportunities?

12 MR. LE: Well, Your Honor, at the very least that
13 question would be premature here, Your Honor, because there was
14 no -- in this record there's no appeal to the BIA or an
15 opportunity for them to address it.

16 THE COURT: They are challenging it in front of me, so
17 I'm trying to figure out, if I certify a class, whether it
18 should include for a claim under the APA or whether I should
19 just stick with the Due Process Clause, which I have given a
20 lot of thought to.

21 MR. LE: Yes, Your Honor, the Government would oppose
22 it with the specific arguments -- since that -- that wasn't the
23 basis for the class certification in the papers. The
24 Government doesn't have specific cites of authority for Your
25 Honor now.

1 THE COURT: Maybe not. Well, they've just sort of
2 waived it anyway, but I just wasn't sure, because there's also
3 a motion for judgment, whether or not -- you're saying that
4 effectively the injunction would be an injunction of the
5 operation of the statute, but that would only be so because of
6 the ruling of the BIA, which wasn't even a regulation.

7 MR. LE: Well, yes, Your Honor. Well, in part we're
8 still -- we can still look at Congressional intent for the
9 burden issues as well as the regulations that were promulgated
10 subsequent thereto as to the burden issue. So irrespective of
11 the BIA's decision at this point, as well, Your Honor, there is
12 the -- there's certainly -- we can certainly look at other
13 factors to determine where authorities --

14 THE COURT: One last question, which I'm struggling --

15 MR. LE: Yes, Your Honor.

16 THE COURT: -- with whether to -- I'm likely to
17 certify a class, and I'm struggling with whether to make it one
18 class or two classes or a class with a subclass. In other
19 words, two big buckets of people, people who haven't ever had a
20 bail hearing and people who got a bail hearing with what might
21 be a due process concern about allocation of burden and that
22 sort of thing. So to you, does it matter, or they are just
23 both equally wrong in your view?

24 MR. LE: Again, Your Honor, that, just based on the
25 belief that the petitioners are seeking -- again, if -- assume

1 that it wasn't barred, the Government would still submit that
2 commonality is still an issue, and therefore, neither a class
3 should be certified or a subclass, so that's the Government's
4 position. As opposed to specifically whether a subclass would
5 be appropriate if Your Honor denies or grants the petitioners'
6 motion to certify, the Government hasn't -- isn't at this time
7 able to submit a position on that because, again, it wasn't
8 briefed, and it wasn't internally discussed.

9 THE COURT: No, it wasn't, but I've been thinking
10 about it because the kind of relief would be very different,
11 not very different but somewhat different, between them.

12 Let's move on to the motion for judgment.

13 MR. NATHANSON: Your Honor, just a couple of points in
14 response; is that okay?

15 THE COURT: Yes, that's fine.

16 MR. NATHANSON: A couple of things. First of all, I
17 wanted to point out *Hamama*, if I'm pronouncing it right, yes,
18 *Hamama*, the issue of declaratory relief came up in a footnote
19 responding to a dissent. The majority said -- the dissent
20 claims that 1252(f)(1) doesn't bar declaratory relief. The
21 court said, be that as it may, both parties agree that the
22 issue of declaratory relief is not before us. And then it went
23 on to express some skepticism about the argument, that it had
24 not been briefed, it had not been argued, it wasn't before the
25 court. The third --

1 THE COURT: Was the issue there -- just out of
2 curiosity, the issue there wasn't bail, was it?

3 MR. NATHANSON: No, it wasn't. It was whether the
4 Government could actually deport some Iraqi nationals that it
5 had been prevented from deporting. So there's that. As far as
6 the issue of enjoining the operation of the statute -- I know
7 you have already ruled on this in *Reid* -- we're asking for
8 exactly the injunction that you felt comfortable issuing in
9 *Reid*. It's purely procedural. We're not asking you to tell
10 the Government that they cannot carry out the statute, that
11 they can't give people bond hearings, that they can't detain
12 people or release people. We're simply asking you to establish
13 the procedural rules that are required by due process, which is
14 something that does not in any way enjoin the operation of the
15 statute.

16 And then I just wanted to point out with respect to
17 the Administrative Procedure Act claim, I hope I didn't give
18 you the impression that we're waiving it. I'm just saying that
19 it's not something that you need to reach at this time. Back
20 in *Pensamiento*, which was, I think, the first of these
21 individual cases, at Footnote 6, you did the same thing. You
22 did what we were asking you to do here, which is not reach the
23 APA claim because you can rule on the due process count.

24 THE COURT: But the reason it makes a difference here
25 is it looks as if -- I know I'm transitioning into the next

1 issue. You are looking for judgment. So that means I'm
2 resolving all the claims. So I'm unable to do that right
3 now --

4 MR. NATHANSON: I see.

5 THE COURT: -- under the Administrative Procedure Act.
6 I just don't know what I think about that.

7 MR. NATHANSON: Well, you can't issue a judgment as to
8 less than all the claims under Rule 54.

9 THE COURT: Or I could do a preliminary injunction.

10 MR. NATHANSON: Or you could do a preliminary
11 injunction, which would be appealable.

12 THE COURT: I haven't swapped that.

13 What?

14 MR. NATHANSON: Which could be appealable.

15 THE COURT: I just never -- I must say, it's creative,
16 but I've never heard of -- I've issued summary judgment and
17 then judgment. I've issued preliminary injunctive relief and
18 then eventually an injunction once I've worked out all the
19 claims. I'm just not sure what a motion for judgment is.

20 MR. NATHANSON: Well, I think we would have moved for
21 judgment on the pleadings except that Rule 12(c) requires the
22 pleadings to be closed before you do that, and since the
23 Government never answered the petition, we weren't in a
24 position to do that.

25 THE COURT: Well, let me ask you this: Has the time

1 run for you to answer this? I don't even know that it has. I
2 forget. Was it 90 days? I mean, it's a long time.

3 MR. LE: Your Honor, it was 60 days for us to answer.
4 However, I believe, based on our June 26 hearing before you,
5 those issues were put on the back burner, for lack of better
6 terms, because we were addressing the individual habeas
7 petitions first and foremost.

8 THE COURT: Those issues meaning?

9 MR. LE: The issues based on the class certification
10 and then the merits of the habeas petition as a whole that we
11 essentially bifurcated the individual habeas petitions.

12 THE COURT: I know we all by agreement -- well, at
13 least I was concerned that the individuals wait the whole
14 distance while we talked through these issues. But I don't
15 know that I suspended the time to answer, did I?

16 MR. LE: Well, it was the Government's understanding,
17 and as we noted in our subsequent filings, that the deadlines
18 set during that hearing were the deadlines that were to be
19 addressed first and foremost, including for a class
20 certification and then all the individual habeas petitions.

21 THE COURT: When do you understand you have to answer
22 it by?

23 MR. LE: Pardon me, Your Honor?

24 THE COURT: When do you understand that you are
25 required to answer the complaint by?

1 MR. LE: It was something that was to be resolved.
2 Obviously the Government moved for a stay and then that was
3 denied, Your Honor. So -- and then the subsequent deadlines
4 that Your Honor had set.

5 THE COURT: Has it already run? What do you have, 60
6 days or 90 days? I should know this by heart.

7 MR. LE: 60 days.

8 THE COURT: So it must have run.

9 MR. LE: The original deadline would have ran, that's
10 correct, Your Honor.

11 THE COURT: All right. So I think the way to handle
12 this is not through a motion for judgment but either a motion
13 for preliminary judgment or, as you say, a motion for judgment
14 on the pleadings. I don't know that I could issue a motion for
15 judgment right now without resolving the APA claim, and I think
16 I could address a motion for preliminary injunction, and then
17 potentially I could order the Government to respond in some
18 reasonable period of time, say 30 days, and you can move for
19 judgment on the pleadings.

20 How do you want to pursue this at this point?

21 MR. McFADDEN: Your Honor, thank you. I think if I
22 could perhaps start just by explaining the reasons that we
23 moved for judgment and the concerns that animate that, and then
24 I can talk about the procedural, you know, the approach that we
25 had suggested.

1 THE COURT: So let me be clear. I am very likely to
2 certify a class. I'm not completely clear about whether it
3 should be two classes or one class or one class with a
4 subclass. I want to think about that for a second. But part
5 of it has to do with the relief requested. It does strike me
6 that going forward it would be pretty easy to require the
7 Government to, on all new cases, to follow this, but
8 retrospectively, I have to deal with the resources available
9 and how they come into Federal Court and -- it's a more
10 complicated situation because, according to the numbers you
11 gave me, maybe 150 people are there, who have had a bond
12 hearing, are still there and didn't get the appropriate burden.
13 I have no idea how many of those people would want to move or
14 have already been removed pursuant to law, I mean, just because
15 they're unlawfully here. But in any event, it's not two or
16 three people. It's over 100 people, right?

17 MR. McFADDEN: Yes, Your Honor. So I think you are
18 correct that as to people who have not yet had a bond hearing,
19 for those people there is no prejudice issue. Whatever order
20 the court enters would just govern their proceeding. So the
21 prejudice issue pertains to people who, as of the date of a
22 judgment of order, have already had their bond hearing and
23 remained detained.

24 We proposed a procedure on Friday in our reply
25 regarding class certification on Page 7 that talks about one

1 option for how the court could address that in an administrable
2 way. The Government has a lot of information about all of
3 these members of the class because they're detaining them and
4 they had DHS trial attorneys who participated in the bond
5 hearings.

6 I think a first step might be to narrow the disputed
7 issues to order the Government to identify those members of the
8 class as to whom it will contest prejudice and as to whom it
9 expects not to contest prejudice. If the Government does not
10 contest the existence of prejudice for a particular individual,
11 that person can just get a new bond hearing because there is no
12 issue to litigate. If the Government does contest prejudice,
13 then what we had suggested in our filing was perhaps the
14 Government would provide the bond record to class counsel and
15 to the individual and then there could be motions to enforce
16 the court's injunction that could be brought to the court,
17 perhaps referred to an appointed master who could work through
18 them.

19 In terms of the numbers, the Government has
20 information about the number of people who it's currently
21 detaining who might be provided a new bond hearing. It has not
22 provided that information. You know, the analysis that we did
23 suggested that in the last six months there were around 260
24 people who were denied bond. You know, we think for most of
25 them prejudice should not be disputed.

1 THE COURT: Is that both under A and C? That's bigger
2 than the numbers you gave me.

3 MR. McFADDEN: So we believe the numbers would relate
4 to A because the C --

5 THE COURT: The statistics you gave us said about half
6 of them got out, 40 percent got out on bond.

7 MR. McFADDEN: Yes, Your Honor. That's the
8 declaration of Sophie Beiers. Give me one second. I can pull
9 it out. And what Ms. Beiers determined was that in about a
10 six-month period --

11 THE COURT: So they denied release of 41 percent of
12 the cases.

13 MR. McFADDEN: That's correct, Your Honor. So about
14 268 people were denied release. Ms. Beiers also looked, I'd
15 point out, at the magnitude of the bonds that were being
16 ordered in connection with the ability to pay, and found, you
17 know, for example, in Hartford the medium bond was over
18 \$25,000, and many people were being detained even after they
19 got bond, indicating those numbers were likely too high to pay
20 for them.

21 Also, the declaration we submitted from Attorney
22 Nouredine established that the bond numbers have been
23 increasing in Boston to the ten to \$20,000 range, which is
24 significant.

25 The reason that we had filed a motion for judgment --

1 THE COURT: Why is it so much higher in Hartford than
2 in Boston?

3 MR. McFADDEN: That is a good question, Your Honor. I
4 don't have an answer for that. It seems to be a consistent
5 trend, though.

6 So, Your Honor, the reason that we had filed --

7 THE COURT: Are there more serious people brought in
8 Hartford or is it still a random --

9 MR. McFADDEN: To my knowledge, it has to do with
10 where the person is residing when they're detained. Generally
11 speaking, at least in the past, people in Connecticut have been
12 detained in Franklin but brought to Hartford for their hearings
13 in general.

14 Your Honor, the reason we -- this goes to, to some
15 extent, the reason that we filed the motion for judgment, and
16 we're seeking a prompt judgment, this is not a case where the
17 Government disputes any of the factual assertions that we have
18 made.

19 THE COURT: Why don't you move for preliminary
20 injunction? I'm just -- that's sort of something I'm familiar
21 with as opposed to issuing a judgment off the bat. Is there
22 something to be gained from doing it this way?

23 MR. McFADDEN: Well, Your Honor, I think just in terms
24 of authority, so under Rule 56(f), once the court observes that
25 there is not factual disputes, which I don't think there are

1 considering the nature of these proceedings --

2 THE COURT: I don't know. In other words, it's an odd
3 animal right now. There's no answer. I think the Government
4 is probably correct, we left that vague -- I'll take your word
5 for that -- after we were trying to work through some of the
6 other issues with respect to the named. You could conceivably
7 do a motion for judgment on the pleadings and then a full
8 judgment, I suppose. You could conceivably do a motion for
9 summary judgment, you could conceivably move for preliminary
10 injunction. I just have never seen someone -- I'm trying to
11 think. There's no reason, I suppose, why you can't, but it's
12 highly unusual and there's no procedural vehicle for it.

13 MR. McFADDEN: Yes, Your Honor. Well, I think that
14 the reason that we were trying to move forward quickly, one was
15 that we know that the -- there don't seem to be any factual
16 issues here. We have seen two filings from the Government, not
17 suggesting that the bond procedures are other than as we have
18 suggested, and as a result, what really remain here are legal
19 questions. And these are questions that this Court has -- you
20 know, we're in a rather unique posture -- this Court has
21 already answered these questions either in the 1226 --

22 THE COURT: I have, and I'm not going to change that.
23 But I do have certain questions on how to handle the class or
24 the portion of the class that has prejudice. So -- and also, I
25 should add, that some of my rulings in the *Reid* case were under

1 the Excessive Bail Clause, which has not been asserted here, so
2 I don't know whether I have addressed it under the Due Process
3 Clause. I don't remember. But in any event, on the key
4 issues, I have addressed them.

5 So let me ask the Government. I mean, my goal is to
6 have this all before the First Circuit, and have this -- it's
7 going to be a huge decision for them. Every District Court
8 that has addressed the issue has placed the burden on the
9 Government, but many courts haven't addressed it. And to my
10 knowledge, other than saying there's no circuit court -- is
11 that right? Maybe the Third, too. The Ninth and the Third may
12 have addressed it.

13 MR. McFADDEN: As far as we're aware, Your Honor.

14 THE COURT: So it's going to be a big decision for the
15 First Circuit. I want to get it all up there is my basic
16 desire. So would you prefer to answer it next week and have
17 them move for judgment on the pleadings? Would you prefer to
18 just agree to a judgment just to move the case along or would
19 you prefer to have a motion for preliminary injunction?
20 Because if you agree to a judgment now, this could
21 short-circuit everything, no pun intended, shorten the road to
22 the circuit.

23 MR. LE: No, Your Honor, we -- to preserve for the
24 record, Your Honor, the Government would like to at least
25 address some of the class certification issues that wasn't

1 exactly addressed before. And Your Honor is exactly right,
2 there's a prejudicial analysis here, and as a baseline for due
3 process challenge, that's exactly what needs to be shown.

4 THE COURT: All right. So let's make this go more
5 quickly. You have 30 days to answer the complaint, and then
6 you can file a motion for preliminary injunction whenever you
7 want. And you will have to just make a strategic -- I will
8 issue a ruling allowing class cert, but it is not 100 percent
9 clear how I'm going to do it yet. Let me at least give it some
10 thought. Then you're going to decide whether or not you want
11 to move for judgment on the pleadings on everything, including
12 the Administrative Procedure Act issues, or whether you want to
13 just move immediately for preliminary injunction based on the
14 Due Process Clause.

15 The one issue I have, which is not any of your issues,
16 is the wonderful law clerk I have who has been working on this
17 leaves, so I start all over again. You know that old saga,
18 don't get sick while the new interns are in and residents in
19 the medical schools. So I start again with somebody. I'm, as
20 you know, very familiar with it, so it may just involve a
21 slight delay, but I leave it up to you. What do you think you
22 will be doing? Do you have any idea or do you want to caucus?

23 MR. McFADDEN: Yes, Your Honor, I think that -- I
24 appreciate the guidance, and I think we would like to confer
25 internally, you know, on what our next steps will be in light

1 of that information.

2 THE COURT: And you'll file an answer in 30 days?

3 MR. LE: Yes, Your Honor.

4 THE COURT: Have you alerted the First Circuit to the
5 fact that this is chugging along?

6 MR. LE: Yes, Your Honor --

7 THE COURT: We could do that, too.

8 MR. LE: Not yet, Your Honor. The Government was
9 intending to submit it in their opening brief and appendix,
10 but, however, we required an extension. So our brief is now
11 due August 12th, I believe.

12 THE COURT: I see.

13 MR. LE: The team working on this issue, due to summer
14 scheduling and --

15 THE COURT: And that's just on the lone habe, right?

16 MR. LE: It was an individual habeas petition, Your
17 Honor, yes, that's correct.

18 THE COURT: Because I would like them to know about
19 the *Reid* case as well as now the *Brito* case. I would love it
20 to all go there together. But I also, I have to say, have some
21 concern that, as far as I can tell, the immigration judges are
22 simply ignoring the case law, not just in this court but in
23 most of the country, because they keep coming to me. I mean,
24 I'm sure other judges are getting them, too, but I keep getting
25 cases where they're just ignoring them, even on cases which are

1 pretty transparently low-level people in terms of no serious
2 crimes, they've been here a long time, they don't seem like
3 they're a risk of flight. So I'm sort of worried that I'm just
4 being -- that the Court is just being ignored, not just me but
5 other judges. That's my concern, which is why I would like to
6 move this quickly.

7 MR. LE: That's -- Your Honor, the Government also
8 would like a resolution before the First Circuit as well. And
9 we certainly are trying our best to make that happen, Your
10 Honor.

11 THE COURT: Right. But I would like -- I guess what
12 I'm saying is I would like to issue some form of injunctive
13 relief, and -- at least with respect to the part that I've
14 ruled on just so it could possibly expedite this, but more
15 importantly, that I just don't keep getting these cases where
16 it's just being ignored.

17 MR. LE: The Government understands Your Honor's
18 previous rulings. However, this case -- this case may not
19 be -- may not be compatible because it's a class -- moving for
20 a class relief as opposed to those individualized cases, mainly
21 because it would be difficult to provide relief for every
22 single one of the class members, given the individual --

23 THE COURT: Well, at least going forward -- well, let
24 me ask you, at least going forward, is the Government willing
25 to commit to following the -- my due process ruling?

1 MR. LE: Your Honor, that's -- I'm not positive if
2 that's the -- if this would be the proper channel regardless,
3 Your Honor. There's a carve-out for individual habeas
4 petitions for these --

5 THE COURT: Sure. But I'm just saying on
6 individuals -- it turns out -- and a significant number of the
7 ones where I have granted the habe and sent it back -- I don't
8 rule but I send it back -- a significant number are getting out
9 on bond. So it actually has an immediate effect. Some aren't,
10 fair enough. In the two cases where they didn't get out, I
11 understood it. I understood why. They applied the burden, and
12 I understood the why. But on a bunch they did let them out,
13 the three in this case. So I'm trying to figure out whether or
14 not the Government can stipulate that going forward all the
15 immigration judges that are part of the class would follow the
16 shifted burden.

17 MR. LE: Your Honor, there's procedural vehicles for a
18 reason to file these individual habeas, and the Government
19 wouldn't -- is not in any position to stipulate that.

20 THE COURT: Okay. I understand. I understand that
21 you wouldn't be, in any event.

22 MR. LE: Way above my pay grade, Your Honor.

23 THE COURT: I thought that might be the answer, so
24 fair enough. But that means it adds to the urgency is my
25 point.

1 MR. McFADDEN: Your Honor, may I just make a quick
2 inquiry? I think you're right that it's concerning that the
3 Government, you know, continues to give bond hearings every day
4 where people are being separated from their families and their
5 homes based on a process where the Government doesn't have to
6 show a reason or consider alternatives to detention or consider
7 ability to pay. That's why we sought expedited judgment, I
8 think, because it's a process. It's prejudicing members of
9 this class, you know, in terms of being in prison every single
10 day.

11 I think in terms of the options you suggested, I just
12 wanted to flag two things. First, in terms of a preliminary
13 injunction, would the Court entertain a motion to expedite the
14 briefing schedule on that?

15 THE COURT: Yes.

16 MR. McFADDEN: Thank you, Your Honor.

17 I think the other option I just wanted to flag is
18 something to consider if a class is certified, is there an
19 option to enter a partial final judgment addressing declaratory
20 or injunctive relief?

21 THE COURT: As soon as the answer comes in, yes.

22 MR. McFADDEN: Okay.

23 THE COURT: Yes.

24 MR. McFADDEN: Thank you, Your Honor.

25 I mean, I think we had filed this motion hoping that

1 the Government would now be able, in response to our motion, to
2 express its views. The Government elected not to do that, but
3 I --

4 THE COURT: Say that again.

5 MR. McFADDEN: The Government elected not to express
6 its views on these issues in response to our motion. We
7 honestly were trying to provide a fair vehicle for them to do
8 that, but if the requirement is going to be wait for an
9 answer --

10 THE COURT: You can move for judgment. I don't
11 understand the reluctance. You can get it more quickly. I
12 don't understand. The usual vehicle I see when someone thinks
13 that there's emergency to it is a motion for preliminary
14 injunction, but you take whatever route that you think is
15 appropriate. You'll -- in any event, you'll answer in 30 days
16 and -- I think you will have to agree that I have ruled on this
17 now multiple times. I am looking for a way of getting this to
18 the circuit.

19 MR. LE: Yes, Your Honor. And the Government submits
20 that it's -- the Doe analysis would be adequate for at least
21 guiding the --

22 THE COURT: Your brief is due when, end of August or
23 so, mid August? Then they get, what, 60 days to respond, and
24 then you have -- how long do they get to reply?

25 MR. LE: I don't know off the top of my head, Your

1 Honor.

2 THE COURT: I forget. I'm not an appellate lawyer,
3 but X amount of time, and then you have to get on a session for
4 oral argument and then it takes, what, three to six months to
5 rule? So that's a long time where people -- where the judges
6 here aren't following it. That's my concern. That's my
7 concern. So, I mean, the First Circuit will do it the best it
8 can, but I would like to have it to have the whole panoply of
9 issues in front of it. Has somebody appealed *Reid* yet? Not
10 necessarily.

11 MR. LE: I have no knowledge of that, Your Honor.

12 THE COURT: No doubt it will happen as night follows
13 day. So I'm just hoping that the -- we can get all three of
14 them on the way. So thank you. I think that's it. Isn't it?

15 (No verbal response.)

16 THE COURT: So when were you going to get back to me
17 on what you wanted to do or do I just wait for whatever you do?

18 MR. McFADDEN: Your Honor, we could respond to the
19 Court tomorrow, if that is okay with --

20 THE COURT: That's fine, by letter -- let me say this:
21 You'll answer in 30 days, but I do not anticipate discovery.
22 Does anyone here anticipate discovery?

23 MR. LE: No, Your Honor.

24 THE COURT: I think so. No discovery, that's stayed.
25 And then if they file an answer and you decide not to move for

1 preliminary injunction, would you say two weeks after their
2 answer, motion for judgment on the pleadings?

3 MR. McFADDEN: Yes, Your Honor.

4 THE COURT: I understand it's August.

5 MR. McFADDEN: No, I think two weeks would be
6 sufficient, Your Honor. In terms of discovery, I mean, I think
7 we have not anticipated now --

8 THE COURT: You could get a little longer because
9 people have vacations. So, I mean, just propose -- what would
10 make sense?

11 MR. McFADDEN: Two weeks after the answer would be
12 fine for us, Your Honor, for a motion for judgment on the
13 pleadings. I just want to clarify in discovery, at the moment
14 we do not anticipate seeking discovery, I think, necessarily
15 depending on -- but I think it will depend a lot on what we see
16 from the Government and how the case progresses. So I think
17 we'll have to make that judgment once we've seen a little more
18 from the Government.

19 THE COURT: Right. It ended up not being that helpful
20 in *Reid*, let me just say. I hoped for a more robust
21 statistical record on what was happening, and it was very hard
22 to compare apples to oranges in terms of the statistics both
23 sides were giving, and I'm not sure it was worth the six
24 months, so I would have to have a pretty persuasive case as to
25 why discovery was needed. I think the issues on due process

1 are pretty straightforward and not fact-dependent.

2 Okay. Well, thank you very much.

3 And you'll send me a letter. You'll converse on these
4 things, maybe confer if you think there is a discovery
5 schedule, and I'll just have to think about it.

6 MR. McFADDEN: Thank you, Your Honor.

7 MR. LE: Thank you, Your Honor.

8 THE CLERK: All rise.

9 (Adjourned, 10:34 a.m.)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF OFFICIAL REPORTER

2

3 I, Linda Walsh, Registered Professional Reporter

4 and Certified Realtime Reporter, in and for the United States

5 District Court for the District of Massachusetts, do hereby

6 certify that the foregoing transcript is a true and correct

7 transcript of the stenographically reported proceedings held in

8 the above-entitled matter to the best of my skill and ability.

9 Dated this 16th day of August, 2019.

10

11

12 /s/ Linda Walsh

13 Linda Walsh, RPR, CRR

14 Official Court Reporter

15

16

17

18

19

20

21

22

23

24

25